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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

BROADWAY ENTERPRISES, INC.,
Petitioner,

vs.

LIQUOR CONTROL COMMISSION OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

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OCTOBER TERM, 1968

No. 1496

BROADWAY ENTERPRISES, INC.,
Petitioner,

vs.

LIQUOR CONTROL COMMISSION OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

QUESTION PRESENTED

May the State of Ohio provide for, and carry out, suspension of Ohio retail liquor permit privileges where a liquor permit holder allows entertainment consisting of dancing which may or can suggest an immoral act, on the liquor permit premises?

§ 4303.18 D-5 permit.

Permit D-5 may be issued to the owner or operator of a night club to sell beer and any intoxicating liquor at retail, only by the individual drink in glass and from the container, for consumption on the premises where sold, only at tables where meals are served; and to sell the same products in the same manner and amounts not for consumption on the premises as may be sold by holders of D-1 and D-2 permits. A person who is the holder of both a D-3 and D-3a permit need not obtain a D-5 permit. The fee for this permit is one thousand dollars.

§ 4301.25 Suspension or revocation of permit.

The board of liquor control may suspend or revoke any permit issued pursuant to Chapters 4301. and 4303. of the Revised Code for the violation of any of the applicable restrictions of such chapters or of any lawful rule or regulation of the board or other sufficient cause, and for the following causes:

(A) For conviction of the holder or his agent or employee for violating a section of Chapters 4301. and 4303. of the Revised Code or for a felony;

(B) For making any false material statement in an application for a permit;

(C) For assigning, transferring, or pledging a permit contrary to the rules and regulations of the board;

(D) For selling or promising to sell beer or intoxicating liquor to a wholesale or retail dealer who is not a holder of a proper permit at the time of the sale or promise;

(E) For failure of the holder of a permit to pay an excise tax together with any penalties imposed by the law relating thereto and for violation of any rule or regulation of the department of taxation in pursuance thereof.

§ 4301.03 Rules and regulations.

The liquor control commission may adopt and promulgate, repeal, rescind, and amend, in the manner required by this section, rules, regulations, standards, requirements, and orders necessary to carry out Chapters 4301. and 4303. of the Revised Code, but all rules and regulations of the board of liquor control which were in effect immediately prior to April 17, 1963 shall remain in full force and effect as rules and regulations of the liquor control commission until and unless amended or repealed by the liquor control commission. The rules and regulations of the liquor control commission may include the following:

* * * * * * * * *

(B) Rules, regulations, and orders providing in detail for the conduct of any retail business authorized under permits issued pursuant to such chapters, with a view to insuring compliance with such chapters and laws relative thereto, and the maintenance of public decency, sobriety, and good order in any place licensed under such permits;

* * * * * * * * *

LCc-1-52. Entertainment—Prohibition Against Improper Conduct.

No permit holder shall knowingly or willfully allow in, upon or about his licensed premises improper conduct of any kind, type or character; any improper disturbances; lewd, immoral activities or brawls; or any indecent, profane, or obscene language, songs, entertainment, literature, pictures, or advertising materials; nor shall any entertainment consisting of the spoken language or songs which can or may convey either directly or by implication an immoral meaning be permitted in, upon or about the permit premises.

Entertainment consisting of dancing, either solo or other-

wise, which may or can, either directly or by implication, suggest an immoral act is prohibited. Nor shall any permit holder possess or cause to have printed or distributed any lewd, immoral, indecent, or obscene literature, pictures or advertising material.

STATEMENT OF THE CASE

Petitioner is the holder of a class D-5 (nightclub) Ohio liquor permit (Section 4303.18, Ohio Revised Code). This case began when Petitioner was cited to appear before a state administrative agency, the Liquor Control Commission, to determine whether such permit should be suspended or revoked upon the ground that Petitioner had allowed "entertainment consisting of dancing, either solo or otherwise, which may or can, either directly or by implication, suggest an immoral act," upon its permit premises, in violation of Ohio liquor regulation LCc-1-52.

At hearing before the administrative agency, three Ohio liquor investigators testified in support of the charge made, describing in detail the dance in question and, in several instances, physically demonstrating portions of it. Petitioner presented nothing in defense other than cross-examination and its arguments as to the nature of the dance and the alleged constitutional requirement that the Commission hear evidence on contemporary community standards of obscenity and morality in order to make a valid ruling.

The result of the administrative hearing was an order under authority of Section 4301.25, Ohio Revised Code, and the provisions of the Ohio Administrative Procedure Act (Chapter 119, Ohio Revised Code) to suspend Petitioner's liquor permit privileges for a period of 28 days. Appeal of that order through the Ohio courts, in which Respondent agency became Appellee, was unsuccessful, and

Petitioner now seeks review of the claimed constitutional question here.

REASONS FOR DENYING THE WRIT

At the outset, it should be clearly understood that the order of the Ohio Liquor Control Commission, out of which this case arises, deals with *nothing* but the privilege of conducting the retail liquor business in the State of Ohio under an Ohio liquor permit. The Ohio Liquor Control Commission has power to deal with nothing more. The order here in question, therefore, does not involve life, liberty or property, merely a licensed privilege (*Solomon v. Liquor Control Commission*, 4 Ohio St. 2d 31; *Abraham v. Fioramonte*, 158 Ohio St. 213; *State ex rel Zugravu v. O'Brien*, 130 Ohio St. 23).

As provided in Section 4301.25, supra, the Ohio Liquor Control Commission is empowered to revoke or suspend Ohio liquor permits for, among others, violation of any applicable restriction of The Ohio Liquor Control Act (Chapters 4301 and 4303, Ohio Revised Code) or the Commission's duly adopted regulations. Regulation LCc-1-52 of the Liquor Control Commission contains several such restrictions and, as here pertinent, provides as follows:

* * * * * * * * *

> "Entertainment consisting of dancing, either solo or otherwise, which may or can, either directly or by implication, suggest an immoral act is prohibited. * * *"

Adoption of such a regulation to control conduct on liquor permit premises is specifically authorized by Section 4301.03(B), Ohio Revised Code.

The status and rights of Ohio liquor permit holders under this type of regulatory restriction have been described by the Ohio Supreme Court as follows:

". . . (I)t is of importance to consider the nature

> of the liquor business, particularly as it here relates to the dispensing and sale of intoxicating liquor at retail by the glass. Because of the harmful potentialities incident to the conduct of such business, those engaging therein must obtain a permit from the state and are thereafter subject to strict regulation by statute and by rules and regulations adopted and promulgated pursuant to statutory authority by the Department of Liquor Control, the regulating and supervising agency created by the state to oversee and police, as it were, the liquor business. One who applies for and is issued a permit to sell alcoholic beverages thereby assents to the reasonable and lawful conditions imposed by statute and rule."
> (*Solomon v. Liquor Control Commission*, 4 Ohio St. 2d 31, 34 (1965), cert. denied. May 2, 1966).

There is no constitutional right to carry on the liquor business (*Giozza v. Tiernan*, 148 U.S. 657 (1893)). It has long been settled that ". . . on account of their well known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a state has the power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guaranties of the 14th Amendment." (*Crane v. Campbell*, 245 U. S. 305, 307 (1917)) "Having the power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants . . ." a state may permit these things under only definitely prescribed conditions. "The greater power includes the less . . . The state may protect her people against evil incident to intoxicants . . . and may exercise large discretion as to the means employed." (*Ziffrin v. Reeves*, 308 U.S. 133, 138, 139 (1939))

In this case the State of Ohio, through its Liquor Control Commission, has considered it in the interest of her people to place broad limits upon the sort of entertainment that

may be presented upon a licensed permit premises. Assuming arguendo that such limits were too broad to be applied generally without invading constitutionally protected rights, they would, we submit, still be entirely permissible limits in this type of administrative regulation of the liquor business.

There is no threat or possibility here of placing Petitioners' owners or employees in jail or of taking their property. Nor is there any limitation placed upon their rights of free speech or free expression generally. Only in the case of certain forms of expression, exceeding express limits on the exercise of a licensed privilege, on the licensed premises, are any sanctions provided, and then they extend only to suspension or termination of that licensed privilege.

From the authorities it would clearly appear that the State of Ohio could choose to prohibit in this manner all live intertainment on liquor permit premises, or all entertainment consisting of dancing. That is, the state could establish such prohibitions as conditions on the continued exercise of the licensed privilege, without infringing on constitutionally protected rights. If that is so, then it is rather difficult to conceive how any prohibition on only certain kinds of entertainment or dancing could amount to such an infringement.

If the theories advanced in Petitioner's brief were correct, the State of Ohio would be obliged to allow topless go-go girls, or topless waitresses, or performances of nude theatricals in its licensed liquor permit premises, if such could be shown to be within "contemporary community standards." We certainly do not understand that to be the law on this point. The State of Ohio can not be required to permit nudity or suggestive entertainment in nightclubs and taverns, just because California or New York or, for that matter, the entire remainder of the country do. Peti-

tioner has no right to carry on the liquor business at all, let alone carry it on in conjunction with any particular kind of entertainment, whether or not the latter is constitutionally protected from criminal prosecution or general restraint.

CONCLUSION

It is the state-controlled privilege of carrying on the liquor business that has been acted on in this case, not life, liberty or property or the constitutionally protected right of freedom of speech and expression. Petitioner's case presents no federal question of substance for review by this Court. The writ prayed for should therefore, be denied.

Respectfully submitted,

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